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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

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11 SAN DIEGO NAVY BROADWAY  
12 COMPLEX COALITION,

13 vs. Plaintiff,

14 U.S. DEPARTMENT OF DEFENSE; et al.,

15 Defendants.

16 CASE NO. 07cv0038 JM(WMc)

17 ORDER GRANTING RULE 12(B)(6)  
18 MOTION TO DISMISS ALL  
19 CLAIMS; DENYING RULE 19  
20 MOTION TO JOIN MANCHESTER  
21 PACIFIC GATEWAY LLC AS A  
22 PARTY

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Defendant Manchester Pacific Gateway LLC (“MPG”) moves to dismiss all  
claims alleged in the First Amended Complaint (“FAC”) pursuant to Rule 12(b)(6) on  
the ground that it is not a proper party to this action. Plaintiff San Diego Navy  
Broadway Complex Coalition (“NBCC”) opposes the motion and separately moves to  
join MPG as a party-defendant under Rule 19. MPG opposes the Rule 19 motion. The  
other defendants have not responded to the motion nor filed a statement of non-  
opposition. For the reasons set forth below, the Rule 12(b)(6) motion to dismiss the  
NEPA claims is granted with prejudice, the Rule 12(b)(6) motion to dismiss the claim  
for declaratory relief is granted with prejudice, and NBCC’s motion to join MPG as a  
party-defendant under Rule 19 is denied without prejudice.

## 1 BACKGROUND

2 On January 4, 2007, NBCC commenced this action against the Untied States  
3 Department of Defense, the Department of the Navy, Naval Facilities Engineering  
4 Command, Naval Facilities Engineering Command Southwest, several individual  
5 federal officers in their official capacities (collectively “Federal Defendants”), and  
6 MPG. Plaintiff seeks declaratory and injunctive relief for alleged violations of the  
7 National Environmental Policy Act (“NEPA”) and the Administrative Procedures Act  
8 (“APA”).

9 The project at issue involves a development agreement between the City of San  
10 Diego and the Department of the Navy for the Navy Broadway Complex located on  
11 four city blocks along the waterfront in downtown San Diego, California. Plaintiff  
12 challenges the November 22, 2006 finding that the project will not have a significant  
13 impact on the environment (“FONSI”). The FONSI determination was based on an  
14 environmental impact statement prepared in 1990, a record of decision prepared in  
15 1992, and an environmental assessment (“EA”) prepared in 2006. (FAC ¶5). Also on  
16 November 22, 2006, MPG and the Department of the Navy entered into a 99 year  
17 ground lease for the development of the project.

18 Among the amended allegations contained in the FAC, NBCC alleges that MPG  
19 intends to proceed with development of the Navy Broadway Complex regardless of  
20 whether the Federal Defendants have violated NEPA; that the Federal Defendants  
21 desire MPG to complete development regardless of any relief that may be granted in  
22 this action; that MPG is presently undertaking steps to complete the development as  
23 quickly as possible, in advance of any final rulings in this case; and that it can only  
24 obtain complete relief if MPG is a party to this action. (FAC ¶7).

25 On the merits of the NEPA claims, NBCC generally alleges that the EA was  
26 prepared behind closed doors, without the public’s knowledge and without any  
27 opportunity for public comment on the accuracy and adequacy of the EA. (FAC ¶¶21,  
28 25). The EA concluded that there was no need to update the 1990 EIS. Plaintiff

1 challenges this finding and alleges that a modern-day EIS or a SEIS is required to  
 2 adequately assess the environmental impact of the project. (FAC ¶¶15, 17, 20, 25).

3 In its first three causes of action, NBCC alleges that Defendants (1) failed to  
 4 prepare an Environmental Impact Statement (“EIS”); (2) failed to prepare a  
 5 supplemental EIS (“SEIS”); and (3) failed to allow public participation before making  
 6 the FONSI. (FAC ¶14-28). The fourth claim seeks a declaration that the lease between  
 7 MPG and the Department of the Navy “is invalid based on the unlawful acts and  
 8 omissions of the other Defendants as alleged in” the FAC. (FAC ¶30). Plaintiff also  
 9 alleges that the lease is invalid under the public-trust doctrine “because the Navy  
 10 Broadway Complex is situated on land that is subject to the doctrine and further  
 11 because the lease, in contravention of the doctrine, adversely affects the public’s right  
 12 of access to and use and enjoyment of the land on which the Navy Broadway Complex  
 13 is situated.” (FAC ¶31). Plaintiff seeks (1) a declaration from the court that  
 14 Defendants failed to comply with NEPA and the APA and that Defendants must  
 15 prepare an EIS or an SEIS and (2) an injunction to prohibit Defendants, or anyone in  
 16 privity with them, from taking any action on any aspect of the Navy Broadway  
 17 Complex project.

18 On May 7, 2007 the court granted MPG’s motion to dismiss the original  
 19 complaint for failure to state a claim under Rule 12(b)(6). The court held that the  
 20 “three NEPA claims alleged by Plaintiff can only be asserted against the Federal  
 21 Defendants.” (Order at p.4:24-25).

## 22 DISCUSSION

### 23 Legal Standards

24 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in  
 25 “extraordinary” cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.  
 26 1981). Courts should grant 12(b)(6) relief only where a plaintiff’s complaint lacks a  
 27 “cognizable legal theory” or sufficient facts to support a cognizable legal theory.  
 28 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should

1 dismiss a complaint for failure to state a claim when the factual allegations are  
 2 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp  
 3 v. Twombly, \_\_\_ 550 U.S. \_\_\_, 127 S.Ct. 1955 (2007). The defect must appear on the  
 4 face of the complaint itself. Thus, courts may not consider extraneous material in  
 5 testing its legal adequacy. Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir.  
 6 1991). The courts may, however, consider material properly submitted as part of the  
 7 complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555  
 8 n.19 (9th Cir. 1989).

9 Finally, courts must construe the complaint in the light most favorable to the  
 10 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116  
 11 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in  
 12 the complaint, as well as reasonable inferences to be drawn from them. Holden v.  
 13 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of  
 14 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In  
 15 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

## 16 **The NEPA Claims**

17 MPG asserts that only the Federal Defendants are proper parties under NEPA.  
 18 The court concludes, for the reasons set forth in its May 7, 2007 Order, that the three  
 19 NEPA claims alleged by Plaintiff can only be asserted against the Federal Defendants.  
 20 Consequently, the court grants MPG’s Rule 12(b)(6) motion to dismiss these claims  
 21 with prejudice.

## 22 **The Declaratory Relief Claim**

23 To state a claim for declaratory relief, a plaintiff must sufficiently allege: (1) an  
 24 actual controversy within the meaning of Article III; and (2) that the actual controversy  
 25 relates to a claim within the court’s subject matter jurisdiction, upon which relief could  
 26 be granted. 28 U.S.C. §2201(a); Calderon v. Ashmus, 523 U.S. 740, 745-47 (1998).  
 27 Stated another way, the question is whether there is a “substantial controversy, between  
 28 parties having adverse legal interests, of sufficient immediacy and reality to warrant the

1 issuance of a declaratory judgment.” Maryland Cas. Co. v. Pacific Coal & Oil Co.,  
 2 312 U.S. 270, 273 (1941). The propriety of declaratory relief is determined at the time  
 3 the action is filed. See Household Bank v. JFS Group, 320 F.3d 1249, 1259-60 (11<sup>th</sup>  
 4 Cir. 2003).

5 MPG asserts that NBCC fails to identify any actual controversy between the  
 6 parties. NBCC is not a party to the contract and, to the extent the court finds the  
 7 environmental review inadequate, the only remedy available under NEPA is to compel  
 8 the Federal Defendants comply with their statutory obligations. Strycker's Bay  
 9 Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 277-28 (1980) (“[O]nce an  
 10 agency has made a decision subject to NEPA’s procedural requirements, the only role  
 11 for a court is to insure that the agency has considered the environmental consequences,  
 12 it cannot ‘interject itself within the area of discretion of the executive as to the choice  
 13 of the action to be taken.’”). Here, NBCC seeks a declaration that the ground lease  
 14 between the Federal Defendants and MPG “is invalid based on the unlawful acts and  
 15 omissions of the other Defendants.” (FAC ¶30). The court concludes that, at the time  
 16 of filing this action, the alleged controversy was too speculative and remote in time to  
 17 satisfy the case or controversy requirement of the Declaratory Judgment Act as NBCC  
 18 fails to show that MPG is proceeding with actual construction-related activities, or  
 19 imminently threatens to do so.<sup>1</sup> NBCC also fails to establish a contractual basis to  
 20 intercede in this action as it has not alleged that it is a party to, or a third party  
 21 beneficiary of, the contract between MPG and the Federal Defendants. Absent some  
 22 showing that actual construction-related activities are “of sufficient immediacy and  
 23 reality to warrant the issuance of declaratory judgment,” Maryland Cas. Co., 312 U.S.  
 24 at 273, NBCC’s claim for declaratory judgment is not yet ripe for adjudication.  
 25 Accordingly, NBCC fails to show that declaratory judgment is presently appropriate.

26 Lastly, NBCC argues that declaratory relief is appropriate because it alleges that  
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28 <sup>1</sup> At the time of oral argument, MPG represented that the project continues in the initial design  
 and planning stages.

1 the ground lease between MPG and the Federal Defendants is invalid under the public-  
2 trust doctrine. Specifically, NBCC contends that the lease is invalid “because the Navy  
3 Broadway Complex is situated on land that is subject to the doctrine and further  
4 because the lease, in contravention of the doctrine, adversely affects the public’s right  
5 of access to and use and enjoyment of the land on which the Navy Broadway Complex  
6 is situated.” (FAC ¶31). Under this theory, MPG alleges that declaratory relief is  
7 available to determine the validity of this allegation.

Even if NBCC’s argument had any merit, (1) NBCC lacks standing to challenge the federal government’s interests in the Naval Broadway Complex property under the public trust doctrine and (2) MPG is not a proper party. NBCC, as the party asserting federal jurisdiction, has the burden of establishing Article III standing. Daimler Chrysler Corp. v. Cuno, 126 S.Ct. 1854, 1861 (2006); Renne v. Geary, 501 U.S. 312, 316 (1991) (the presumption is the federal court lacks jurisdiction “unless the contrary appears affirmatively from the record”). First, whether the federal government’s fee simple interest in the Navy Broadway Complex property is subject to restrictions under the state’s public trust doctrine is an issue between the federal government and the State of California, not private parties. See United States v. 15,320 Acres of Land, More or Less, in San Diego County, 1991 U.S. Dist. LEXIS 21875, at \*1 (S.D. Cal. July 1, 1991). NBCC simply fails to identify any authority permitting a private party to challenge the federal government’s fee simple interests under the public trust doctrine. Second, MPG is not a proper party from whom NBCC may obtain a remedy under the public trust doctrine or NEPA.<sup>2</sup>

24       <sup>2</sup> On the merits, the court takes judicial notice, pursuant to FRE 201, of United  
25 States District Court Judge William B. Enright's 1991 order finding that the "United  
26 States holds the deeded [NBCC] parcels in fee simple subject only to certain utility  
27 easement rights held by the City of San Diego." United States v. 15.320 Acres of  
28 Land, 1991 U.S. Dis. LEXIS 21875 at \*20. There, in a condemnation action between  
the United States, the State of California, the San Diego Unified Port District, and the  
City of San Diego, the United States sought and obtained a "ruling that its ownership  
of these parcels [the Navy Broadway Complex property] is not restricted by a  
'tidelands trust' interest...." Id. at \*2-3. At the time of oral argument, NBCC did not  
seriously dispute that Judge Enright's order is determinative of the public trust doctrine

1        In sum, NBCC fails to establish that it may maintain a declaratory relief claim  
 2 against MPG under the Declaratory Judgment Act. To the extent MPG seeks to assert  
 3 a declaratory relief claim against MPG based on the public trust doctrine, the claim is  
 4 dismissed with prejudice.<sup>3</sup>

5 **Rule 19 Joinder**

6        NBCC contends that MPG is a proper party under Rule 19. Rule 19(a)(1)  
 7 provides that a person may be joined as party if “in the person’s absence complete  
 8 relief cannot be accorded among those already parties.” Joinder will not be mandated  
 9 unless the court cannot provide meaningful relief in the absence of the party sought to  
 10 be joined. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043-44 (9<sup>th</sup>  
 11 Cir. 1983).

12      Plaintiff relies on Kettle Range Conservation Group v. U.S. Bureau of Land  
 13 Management, 150 F.3d 1083 (9th Cir. 1998) for the proposition that it will not attain  
 14 an effective remedy unless MPG is joined as a party. In Kettle Range the Bureau of  
 15 Land Management (“BLM”) commenced a project whereby it exchanged federally  
 16 owned forested lands for privately held “shrub-steppe.” Id. at 1087. Plaintiff sued to  
 17 compel the federal agency to comply with NEPA. After the district court denied  
 18 plaintiff’s motion for preliminary injunction, BLM set about to exchange the  
 19 properties. About one year later, in May 1998, the district court granted plaintiff’s  
 20 motion for summary judgment, concluding that BLM failed to comply with its  
 21 obligations under NEPA. The court also enjoined the BLM from continuing to  
 22 exchange the remaining 8% of the properties pending completion of an environmental  
 23 assessment. The district court declined to rescind the already completed exchange  
 24 contracts because plaintiff had failed to timely join the individual property owners as  
 25 \_\_\_\_\_  
 26 issue.

27      <sup>3</sup> NBCC requests leave to amend its Declaratory Judgment Act claim to add additional non-  
 28 identified factual allegations in support of the applicability of the public trust doctrine to the Navy  
 Broadway Complex property. Because, for the above stated reasons, there appears to be no  
 circumstances under which NBCC may obtain any relief from MPG under the public trust doctrine,  
 the court dismisses this portion of its declaratory relief claim with prejudice.

1 parties under Rule 19. The Ninth Circuit affirmed noting that “the parties holding title  
 2 to the lands were necessary because the district court could not grant complete relief  
 3 without “impair[ing] or imped[ing] their interests” under Rule 19(a)(2). Id. at 1086.  
 4 The Ninth Circuit also noted that substantial irreversible action had occurred on the  
 5 properties that were not joined as parties.

6 Here, NBCC fails to show how its interests would be impaired or impeded if  
 7 MPG is not made a party-defendant to this action. In Kettle Range the Ninth Circuit  
 8 upheld the district court’s impairment analysis under Rule 19 and its conclusion that  
 9 plaintiff had moved too late for joinder because 92% of the real property interests had  
 10 already been transferred to private parties and certain parcels of land had already been  
 11 logged. The present case is not like Kettle Range in the sense that plaintiff moves too  
 12 late for intervention. Rather, in this case, Plaintiff moves too prematurely to join MPG  
 13 as a party-defendant. There is no indication or allegation that MPG is proceeding with  
 14 actual construction related activities, or threatens to do so, prior to resolution of  
 15 Plaintiff’s NEPA claims. NBCC fails to show that there is a sufficiently imminent  
 16 impairment to the Navy Broadway Complex site which would prevent NBCC from  
 17 obtaining complete relief.

18 Moreover, it appears that NBCC is presently able to obtain complete relief from  
 19 the Federal Defendants without MPG’s joinder. Whether MPG’s interests would be  
 20 adequately represented by the Federal Defendants depends on consideration of three  
 21 factors: (1) whether “the interest of the present parties are such that it will undoubtedly  
 22 make all” of the absent party’s arguments; (2) whether the party is “capable of and  
 23 willing to make such arguments;” and (3) whether the absent party would “offer any  
 24 necessary element to the proceedings” that the present parties would neglect.”  
 25 Sherman v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992). Here, the court  
 26 concludes that (1) the Federal Defendants would raise any argument MPG could raise;  
 27 (2) the Navy is capable and willing to argue its compliance with NEPA; and (3) MPG  
 28 does not offer any necessary element to the present action because only the Federal

1 Defendants have obligations under NEPA, not MPG.

2 In light of the above discussion, the court concludes that NBCC fails to establish  
3 that MPG is a proper party under Rule 19. The court notes that, absent any actual or  
4 imminent threat of construction-related activities occurring on the Navy Broadway  
5 Complex property prior to resolution of NBCC's NEPA claims, MPG is not a proper  
6 party under Rule 19 and NBCC is capable of obtaining complete relief from the Federal  
7 Defendants.

8 In sum, the motion to dismiss the NEPA claims is granted with prejudice, the  
9 motion to dismiss the declaratory relief claim is granted with prejudice to the extent  
10 NBCC seeks to raise the public trust doctrine to invalidate the lease between MPG and  
11 the Department of the Navy, and the motion to join MPG under Rule 19 is denied.

12 **IT IS SO ORDERED.**

13 DATED: 8/23, 2007

14   
15 **JEFFREY T. MILLER**  
16 United States District Judge

cc: All parties

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